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BIA “AFFIRMANCE WITHOUT OPINION”: WHAT FEDERAL COURT CHALLENGES REMAIN?

Practice Advisory¹

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The Board of Immigration Appeals (BIA) implemented its current “affirmance without opinion” (AWO) regulations more than two years ago. *See* 67 Fed. Reg. 54878 (Aug. 26, 2002). Since then, it has issued AWO decisions in thousands of cases. Many of these cases were appealed to federal court and as a result, all federal courts of appeals have ruled on the validity of the AWO decision-making practice. It is now well-settled that certain challenges to AWO decision-making are not viable. For example, courts have universally rejected a general due process attack on the AWO procedure. Despite this, there have been successful challenges to the *application* of the AWO procedure in certain circumstances. This practice advisory discusses the types of AWO challenges that have failed and those that remain available.

This practice advisory supplements and updates several earlier practice advisories AILF issued on AWO.² While information in each of these earlier practice advisories continues to be useful, you must remember that the case law has continued to evolve. Consequently, the information and suggestions contained in the earlier practice advisories

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² *See* “How to Challenge an Affirmance Without Opinion by a BIA Member,” http://www.aifl.org/lac/lac_pa_100102.asp (Sept. 27, 2002); Challenging a BIA Summary Affirmance in Federal Court: How to Distinguish *Albathani v. INS* and *Gonzalez-Oropeza v. U.S. Attorney General*,” http://www.aifl.org/lac/lac_pa_postalbathani_032503.pdf (Mar. 25, 2003); “Update on Affirmance Without Opinion Litigation,” http://www.aifl.org/lac/lac_pa_120403.asp (Sept. 23, 2003); and “Update on BIA Affirmance Without Opinion Litigation,” http://www.aifl.org/lac/lac_pa_120903.asp (Dec. 9, 2003).

must be read in conjunction with this current practice advisory and any cases that are subsequently issued. The information in this advisory is accurate as of the date of this practice advisory, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

What challenges to the AWO procedure are no longer viable?

Courts agree that the AWO procedure in and of itself does not violate due process or basic rules of administrative law. The courts of appeals are in agreement that a general due process challenge to the AWO procedure is not viable. The majority of these courts also have rejected the argument that the AWO procedure on its face violates basic rules of administrative law by interfering with the federal court's ability to review the agency decision. Several courts also have rejected the claim that the AWO regulations violate the Immigration and Nationality Statute (INA). For relevant cases in each circuit, *see* Column 1 of the attached chart.

What challenges to the AWO procedure remain?

In most circuits, there remain several ways to successfully challenge the application of the AWO procedure in specific types of cases. Keep in mind, however, that a challenge to the use of the AWO procedure in a particular case generally will not be successful *unless* there are substantive errors in the merits of the case that you are also challenging. The following highlights arguments against the use of the AWO procedure that have been successful.

- 1. As a threshold matter, a number of courts have held that they have jurisdiction to review a Board member's determination to issue an AWO decision.**

In cases throughout the country that challenge the use of the AWO procedure, the government has consistently taken the position that federal courts lack jurisdiction to consider whether the Board has complied with its own AWO regulations. Federal court review of a case is not permitted under the Administrative Procedures Act (APA) where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Relying on this section, the government claims that the decision whether to issue an AWO decision is within the "unfettered" discretion of the agency and thus argues that the courts lack jurisdiction under the APA.

The First, Third and Ninth Circuit Courts of Appeals have squarely rejected the government's arguments. These courts all have found that the decision whether to issue an AWO decision is not subject to unfettered discretion, but instead that Board members are bound by non-discretionary regulatory criteria. Consequently, these courts have held that they have jurisdiction to review the application of the AWO procedure to a particular case. *See Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003);

Smriko v. Ashcroft, 387 F.3d 279 (3d Cir. 2004); and *Chen v. Ashcroft*, 378 F.3d 1081, 1087 (9th Cir. 2004), *pet. for reh'g en banc pending*.³

Several other courts have considered the question of whether the Board member followed the regulations in applying the AWO procedure to a case, without directly addressing the jurisdictional question. *See, e.g., Denko v. Ashcroft*, 351 F.3d 717 (6th Cir. 2003) (assuming without deciding that jurisdiction exists and finding that the procedure was properly applied in the case); *Garcia v. Attorney General*, 329 F.3d 1217 (11th Cir. 2003) (finding that the case satisfied the AWO requirements without specifically examining its own jurisdiction over this issue).

In contrast, the Eighth and Tenth Circuit Courts of Appeals have accepted the government's arguments and held that they are without jurisdiction to consider a challenge to the application of the AWO procedure to a case. *See Ngure v. Att'y Gen.*, 367 F.3d 975 (8th Cir. 2004)⁴; *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir. 2004).

Note, however, that even in cases where the courts found jurisdiction to review the application of the AWO procedure, the court may not necessarily exercise this review. This is discussed in more detail in Section 3.

See Column 2 of the attached chart for identification of the lead cases in each circuit on this issue.

2. A challenge to the AWO procedure may exist where the Board's summary affirmance makes it impossible for a reviewing court to determine if it has jurisdiction.

Several courts have ruled that in certain circumstances, a summary affirmance by the Board is impermissible because it makes it impossible for a court to determine if it has jurisdiction over a petition for review. When this happens, the courts are willing

³ Jurisdiction may be precluded on some other basis, however. *See, e.g., Falcon-Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003) (finding review of the use of the AWO procedure prohibited where it would involve review of a discretionary decision over which court's jurisdiction barred by INA § 242).

⁴ The 8th Circuit has left open the possibility that an exception to this rule might apply in a case in which an IJ decision is based upon both grounds that are judicially reviewable and grounds that are not subject to review (*see* section 2 of this advisory), and where an intervening legal development may have affected the IJ decision. To date, the court has done nothing more than recognize the possibility of this exception. *See, e.g., Sui v. Ashcroft*, 395 F.3d 863 (8th Cir. 2005) (recognizing this as possible exception but finding no intervening legal developments related to the case).

to remand the case with instructions that the Board must explain its reasons for affirming the IJ decision.

This situation arises when the IJ issues a decision that is based upon alternate holdings, at least one of which is reviewable by the court and one of which is not reviewable. For example, the INA generally prohibits judicial review of a decision denying asylum because the application was not timely filed. *See* 8 U.S.C. § 1158(a)(3). In some cases an IJ will deny an asylum application because it was not timely filed, but also hold in the alternative that the individual is ineligible for asylum on the merits. Because the AWO procedure prohibits a Board member from explaining the reasons for an affirmance, the court in such a case will not be able to tell on what ground the Board member affirmed the IJ decision. If the Board member agreed with the IJ that the application was not timely filed, the court would have no jurisdiction. If the Board member affirmed the decision only on the merits, however, then the court would have jurisdiction to review the case. Because of the jurisdictional “conundrum” that this creates, several courts have held that use of the AWO procedure in this situation is impermissible. *See e.g., Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003); *Zhu v. Ashcroft*, 382 F.3d 521 (5th Cir. 2004); *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. 2004).

Both the Board and the Department of Justice (DOJ) apparently now recognize that the AWO procedure should not be used if it will result in this type of jurisdictional conundrum, and that a remand is appropriate in any case in which a federal court faces this dilemma. In a brief to the Supreme Court, the DOJ attorneys informed the Court that:

We have been informed by the Executive Office of Immigration Review ... that ... the Board has altered its practices and determined that in cases where the IJ’s decision rests on both reviewable and nonreviewable grounds for denying relief from removal, AWO procedures should not be utilized. Furthermore, [the DOJ] ... has adopted a policy of consenting to remands in such cases, including those that were decided under the AWO procedures prior to the policy change and that raise the jurisdictional conundrum.

See Kebede v. Gonzales, No. 04-280 (Supreme Court), Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 20.⁵ In making this representation, DOJ specifically cited to *Haoud*, *Zhu*, and *Lanza* as cases in which the jurisdictional conundrum was present.

⁵ The Supreme Court has since denied certiorari in this case. *See Kebede v. Gonzales*, 161 L.Ed. 2d 523 (Mar. 28 2005).

In light of the government’s representation, attorneys handling “jurisdictional conundrum” cases that are in federal court can ask the government to join in a motion to remand, and can move for a remand even without the government’s cooperation. Even if the case is not in federal court, attorneys whose clients received AWO decisions may consider filing a motion to reconsider with the Board. Although the Board’s regulations preclude motions to reconsider based solely on the argument that the Board member should not have issued an AWO decision, arguably, this regulation is inapplicable to jurisdictional conundrum cases; alternatively, the regulation conflicts with the circuit court cases remanding where the Board’s AWO decision prevented the court from determining its own jurisdiction. *See Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003); *Zhu v. Ashcroft*, 382 F.3d 521 (5th Cir. 2004); *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. 2004).

This strategy can be successful even in those circuits that have indicated generally a lack of jurisdiction to review an AWO decision. For example, the 8th Circuit has held that it generally does not have jurisdiction to review the use of the AWO procedure. *See Ngure v. Ashcroft*, 367 F.3d 975 (8th Cir. 2004); *Sui v. Ashcroft*, 395 F.3d 863 (8th Cir. 2005). Despite this, it has remanded a case presenting this issue on petitioner’s motion with instructions that the Board review the case and indicate the grounds upon which it affirms the IJ’s decision. *See Malonga v. Ashcroft*, No. 04-2059 (8th Cir.) (docket entry of April 15, 2005).

See Column 3 of the attached chart for identification of the lead cases in each circuit on this issue.

3. Even where jurisdiction is not an issue, two courts have held that the application of the AWO procedure to a particular case was in error.

As noted in section 1, some courts have found that they have jurisdiction to review the Board’s application of the AWO procedure. The fact that jurisdiction exists, however, does not mean that a court will always exercise this review. For example, courts have indicated that in many cases it is unnecessary to review the Board’s use of the AWO procedure because the court can resolve the case on the merits by reviewing the IJ’s decision. *See, e.g., El Moraghy v. Ashcroft*, 331 F.3d 195, 206 (1st Cir. 2003) (review of decision to issue an AWO decision unnecessary where case is already being remanded on the merits); *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004) (indicating that it makes no practical difference whether AWO properly applied when court can review the IJ decision on the merits); *Falcon-Carriche v. Ashcroft*, 350 F.3d 845, 853 n.7 (9th Cir. 2003) (in most cases, review of the IJ decision on the merits and the decision to use the AWO procedure “collapses into one analysis”).

Cases that present the jurisdictional conundrum discussed in section 2 are the clearest example of when federal court review should be exercised. There are other situations in which it is appropriate for a court to remand a case for improper use of the AWO procedure, even though no jurisdictional questions are involved. The Third and the Ninth Circuit Courts of Appeals both have done exactly this. In these cases, the

courts found that the regulatory requirements for an AWO decision were not satisfied.⁶ Moreover, because both cases raised “novel” issues for which there was no squarely controlling precedent, the courts remanded the cases to the Board to allow it the opportunity to first rule on the issue. *Smriko v. Ashcroft*, 387 F.3d 279 (3d Cir. 2004); and *Chen v. Ashcroft*, 378 F.3d 1081, 1087 (9th Cir. 2004), *pet. for reh’g en banc pending*.

See Column 4 of the attached chart for identification of the lead cases in each circuit.

⁶ For a discussion of the regulatory requirements for an AWO decision, *see* “How to Challenge an Affirmance Without Opinion by a BIA Member,” http://www.aifl.org/lac/lac_pa_100102.asp (Sept. 27, 2002)

The following chart identifies the primary cases in each circuit on each of the issues identified in the practice advisory. This chart is current as of April 27, 2005. The case law on this issue continues to evolve, so be sure to research for any new cases in your circuit after this date.

Circuit Court	Column 1 Does AWO violate due process or administrative law?	Column 2 Does court have jurisdiction to review Board's decision to issue an AWO decision?	Column 3 Judicial review where court's own jurisdiction in question?	Column 4 Will court actually review Board's application of AWO regulations? ⁷
1st	No -- <i>Albathani v. INS</i> , 318 F.3d 365 (1st Cir. 2003)	Yes – <i>Haoud v. Ashcroft</i> , 350 F.3d 201 (1st Cir. 2003); <i>cf. El Moraghy v. Ashcroft</i> , 331 F.3d 195, 206 (1st Cir. 2003) (review of decision to issue an AWO decision unnecessary where case is already being remanded on the merits)	Yes -- <i>Haoud v. Ashcroft</i> , 350 F.3d 201 (1st Cir. 2003)	Probably – <i>see Haoud v. Ashcroft</i> , 350 F.3d 201 (1st Cir. 2003) (questioning use of AWO procedure where new evidence before the BIA)
2d	No -- <i>Zhang v. U.S. DOJ</i> , 362 F.3d 155 (2d Cir. 2004)	Possibly – <i>see Shi v. BIA</i> , 2004 U.S. App. LEXIS 13631 (2d Cir. 2004) (unpublished) (finding that the use of the AWO procedure was not an abuse of discretion)	No case	Possibly – <i>see Shi v. BIA</i> , 2004 U.S. App. LEXIS 13631 (2d Cir. 2004) (unpublished) (finding that the use of the AWO procedure was not an abuse of discretion)
3d	No -- <i>Dia v. Ashcroft</i> , 353 F.3d 228 (3d Cir. 2003) (en banc) (also rejecting claim that AWO inconsistent	Yes – <i>Smriko v. Ashcroft</i> , 387 F.3d 279 (3d Cir. 2004) (finding that a court can review whether the agency properly applied non-	No case	Yes – <i>Smriko v. Ashcroft</i> , 387 F.3d 279 (3d Cir. 2004) (finding that BIA misapplied AWO procedure in violation of the regulations); <i>see</i>

⁷ For a discussion of the difference between columns 2 and 4, see sections 1 and 3 above.

	with the INA)	discretionary AWO factors from the regulations)		<i>also Berishaj v. Ashcroft</i> , 378 F.3d 314 (3d Cir. 2004) (criticizing use of AWO); <i>Fang v. Ashcroft</i> , 2004 U.S. App. LEXIS 22699 (3d Cir. 2004) (unpublished) (remanding because use of AWO procedure was an abuse of discretion)
4th	<i>No -- Belbruno v. Ashcroft</i> , 362 F.3d 272 (4th Cir. 2004) (also rejecting claim that AWO inconsistent with the INA)	No case	No case	No case
5th	<i>No -- Soadjede v. Ashcroft</i> , 324 F.3d 830 (5th Cir. 2003)	Possibly – <i>see Zhu v. Ashcroft</i> , 382 F.3d 521 (5th Cir. 2004) (reviewing AWO decision where its use prevented court from determining its own jurisdiction)	Yes – <i>Zhu v. Ashcroft</i> , 382 F.3d 521 (5th Cir. 2004) (remanding case where court could not tell if case was denied on an issue over which it had jurisdiction)	No case
6th	<i>No -- Denko v. INS</i> , 351 F.3d 717 (6th Cir. 2003)	Possibly – <i>see Denko v. INS</i> , 351 F.3d 717 (6th Cir. 2003) (declining to decide the issue but labeling government’s argument “doubtful”)	No case	No case
7th	<i>No -- Georgis v. Ashcroft</i> , 328	No decision; <i>but see Olowo v.</i>	No case	Possibly, at least in limited

	F.3d 962 (7th Cir. 2003)	<i>Ashcroft</i> , 368 F.3d 692 (7th Cir. 2004) (declining to decide the issue but indicating that it makes no practical difference whether AWO properly applied when court can review the IJ decision on the merits)		circumstances – <i>see Ciorba v. Ashcroft</i> , 323 F.3d 539 (7th Cir. 2003) (finding no error in Board having employed the AWO procedure); <i>but see Georgis v. Ashcroft</i> , 328 F.3d 962 (7th Cir. 2003) (indicating that in many cases it will not make a practical difference whether AWO properly applied when court can review the IJ decision on the merits).
8th	<i>No -- Loulou v. Ashcroft</i> , 354 F.3d 706 (8th Cir. 2003), <i>amended by</i> 2004 U.S. App. LEXIS 8347 (8th Cir. April 28, 2004) ⁸	No – <i>see Ngure v. Ashcroft</i> , 367 F.3d 975 (8th Cir. 2004); <i>Lau May Sui v. Ashcroft</i> , 395 F.3d 863 (8th Cir. 2005)	Generally no, with the possible exception of cases in which there is both a reviewable and non-reviewable issue and a new development in the law that may have undermined the IJ's reasoning. <i>Ngure v. Ashcroft</i> , 367 F.3d 975 (8th Cir. 2004); <i>see also Somakoko v. Gonzales</i> , 399 F.3d 882 (8th Cir. 2005), <i>pet for</i>	No – <i>see Ngure v. Ashcroft</i> , 367 F.3d 975 (8th Cir. 2004); <i>Lau May Sui v. Ashcroft</i> , 395 F.3d 863 (8th Cir. 2005)

⁸ The Eighth Circuit also has rejected an argument that the AWO procedure violates the separation of powers doctrine, finding that this argument is essentially a due process argument foreclosed by *Loulou*. *See Reyes Vasquez v. Ashcroft*, 395 F.3d 903, 906 (8th Cir. 2005).

			<i>reh'g pending</i>	
9th	<i>No -- Falcon-Carriche v. Ashcroft</i> , 350 F.3d 845 (9th Cir. 2003)	Yes – <i>see Falcon-Carriche v. Ashcroft</i> , 350 F.3d 845 (9th Cir. 2003); <i>Chen v. Ashcroft</i> , 378 F.3d 1081 (9th Cir. 2004)	Yes – <i>Lanza v. Ashcroft</i> , 389 F.3d 917 (9th Cir. 2004); <i>but see Kasnecovic v. Gonzales</i> , 400 F.3d 812 (9th Cir. 2005) (distinguishing <i>Lanza</i>)	Yes – <i>see Chen v. Ashcroft</i> , 378 F.3d 1081 (9th Cir. 2004) (finding that the Board violated the AWO regulations because the case did not satisfy the regulatory criteria)
10th	<i>No -- Yuk v. Ashcroft</i> , 355 F.3d 1222 (10th Cir. 2004)	No – <i>Tsegay v. Ashcroft</i> , 386 F.3d 1347 (10th Cir. 2004)	No case – <i>but see Sviridov v. Ashcroft</i> , 358 F.3d 722 (10th Cir. 2004) (distinguishing <i>Haoud</i> because here the IJ did not rule on alternate reviewable and non-reviewable grounds)	No – <i>Tsegay v. Ashcroft</i> , 386 F.3d 1347 (10th Cir. 2004); <i>but cf. Batalova v. Ashcroft</i> , 355 F.3d 1246 (10th Cir. 2004) (reviewing Board's decision to issue a brief order under 8 CFR § 3.1(e)(5))
11th	<i>No -- Mendoza v. U.S. Att'y Gen.</i> , 327 F.3d 1283 (11th Cir. 2003)	Possibly – while the court has not explicitly ruled on this issue it has considered whether a particular case satisfies the AWO regulations. <i>See Garcia v. Attorney General</i> , 329 F.3d 1217 (11th Cir. 2003) (finding that the case satisfied the AWO requirements); <i>Gonzalez-Oropeza v. Ashcroft</i> , 321 F.3d 1331 (11th Cir. 2003) (same)	No case	Possibly – while the court has not explicitly ruled on this issue it has considered whether a particular case satisfies the AWO regulations. <i>See Garcia v. Attorney General</i> , 329 F.3d 1217 (11th Cir. 2003) (finding that the case satisfied the AWO requirements); <i>Gonzalez-Oropeza v. Ashcroft</i> , 321 F.3d 1331 (11th Cir. 2003) (same)